SUPREME COURT, U.S.
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87-1808

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1988

TERCO, INC., PETITIONER,

V.

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION, RESPONDENT,

PETITIONER FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Petitioner, Terco, Inc., was a successor corporation to the Sugartree Corporation and therefore liable for damages assessed against Sugartree pursuant to Section 105(c)(2) of the Federal Mine Safety and Health act of 1977, 30 U.S.C. 815(c)(2).

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IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1988

NO. _____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to review the Judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on the 8th day of December, 1987, and the denial of the Petitioner's Motion for Rehearing of said Judgment entered on the 6th day of January, 1988.

OPINION BELOW

The opinion of the Court of Appeals (App. pg. 50-57). The decision affirmed the Judgment of the Commission upholding the Administrative Law Judge's finding that Terco, Inc., was a successor

corporation to Sugartree Corporation.

JURISDICTION

The Judgment of the United States Court of Appeals was entered on December 8, 1987, and the Petitioners Motion for Rehearing was denied on January 6, 1988. This Court has Jurisdiction pursuant to Section 1254 to Title 28.

CONSTITUTIONAL PROVISIONS INVOLVED

NONE.

STATUTES AND FEDERAL RULES INVOLVED

Section 105 (c) (2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815 (c) (2).

STATEMENT OF THE CASE

On December 27, 1984, the Secretary of Labor filed an action on behalf of A.C. Taylaor, James Corbin, and Robert Corbin with the Federal Mine Safety and Health Review Commission (Commission) pursuant to Section 105 (c) (2) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 815 (c) (2). The Secretary alleged that three complainants had been discharged from their jobs with Sugartree Corporation in retaliation for making safety complainants concerning unhealthy dust conditions at the mine. The complainants were brought under Section

1/ James and Robert Corbin, through the Secretary settled their complaints against Terco, Inc., Sugartree Corporation, and Randal Lawson. They are no longer parties to this action. (Order to vacate, AR 1650-1653).

Section 105 (c) (1) of the Mine Act, 30 U.S.C. 815 (c) (1). Discrimination Complaints, Ar 1650-1653. Sixth Circuit App. p. 29-34). On December 10, 1985, an Administrative Law Judge, Melick, of the Commission found Terco, Inc., Sugartree Corporation, and Randall Lawson jointly and severally liable for damages caused by the unlawful discharge of Mr. Taylor. (Decision on Merits, AR 1464-1467. App. p. 1-21 . After making determination as to back wages owed to the miners, the judge issued his final decision on February 5, 1986. He determined that as of that date, the respondents owed Mr. Taylor $35,811.74. (Decision on backpay & interest, AR 1505-1519. App. p. 22-31).

On March 7, 1986, Terco, Inc. filed with the Commission a petition for discretionary review of the judge's decision, pursuant to Section 113 (d) (2) (A) of the Mine Act, 30 U.S.C. 823 (d) (2) (A). (Petition for discretionary review,

AR 1520-1529). Sixth Circuit App. p. 20-28). The issue for which Terco sought review was its liability as successor to Sugartree. The Commission directed review and, on March 30, 1987, affirmed the administrative law judge's decision. (Decision of FMSHRC, AR 1654-1660. App. p. 32-49). It held that Terco, as the successor to Sugartree, is liable jointly and severally with Sugartree and Randal Lawson, for the illegal discharge of Mr. Taylor.

On April 28, 1987, Terco filed a petition for review of the commission's decision with the United States Court of Appeals for the Sixth Circuit Court of Appeals affirmed the Commissions' decision and ordered enforcement of the Commission's orders. (App. p. 50-57). The Petitioner then filed a Motion to Reconsider it's decision and order with the Sixth Circuit. On January 6, 1988, the U.S. Court of Appeals for the Sixth

Circuit denied the Petitioner's motion to reconsider its decision. (App. pg. 58).

STATEMENT OF FACTS

Since the only issue before the Court is whether the Appellant, Terco, Inc., was a successor corporation to Sugartree Corporation, the Appellant will generally restrict its statement of facts to the relationship of the two companies, Terco, Inc., was found by the administrative law judge to be liable for damage awards, civil penalties, and reinstatement for A.C. Taylor, who was dismissed by Sugartree Corporation because of his refusal to work in unsafe mining conditions. (Decision on merits, AR 1956-1959, App. p. 1-21).

Terco, Inc. was formed by Terry McCreary, its sole owner before the incident involving Mr. Taylor occurred. (Transcript of Hearing AR p. 960, Sixth Circuit App. p. 292). Before this incident, Terco, Inc. became a contract miner of one of the larger coal companies in Southeastern Kentucky, Richland Coal

Company. It did this by contracting with Richland Contracting Corporation, a subsidary of Richland Coal Company, to mine leased by Richland Coal Company and deliver same to a tipple owned by Richland Coal Company for a specified price per ton. (Transcript of Hearing AR p. 990, 996, Sixth Circuit App. p. 310-316).

Terco, Inc. did not buy out or take over the prior operation of Sugartree Corporation. (Transcript of Hearing AR p. 881-884, Sixth Circuit, App. p. 254-257). Sugartree Corporation was not a subcontractor or contract miner of Richland Contracting or Richland Coal Company. (Transcript of Hearing AR p. 674, Sixth Circuit, App. p. 134). It was an independent mining corporation which was to mine any coal on which it had leases and sell it any place it could locate a market. It sold its coal primarily to Richland Coal Company and Gatliff Coal Company. (Transcript of Hearing AR p. 992-994, Sixth Circuit App. p. 312-319).

For various reasons Sugartree

Corporation ceased operating on July 6, 1984. Terco, Inc., which was already in business as a contract miner for Richland Contracting Company in another mine eventually began mining coal through the same driftmouth (opening) that Sugartree had previously used; however, there was no buy-out leases, assets, or stock from Sugartree Corporation. (Transcript of Hearing AR p. 995, 999, Sixth Circuit App. p. 315, 319). Sugartree Corporation simply ceased operating. (Transcript of Hearing AR p. 881-884, Sixth Circuit App. p. 254-257).

Richland Coal Company and its subsidiary, Richland Contracting, owned susbstantial coal holdings in the form of leases from J.M. Huber Corporation. A portion of this property joined the property formerly worked by Sugartree Corporation. In evaluating how to best get to its minerals Richland determined that it would be easier and less expensive to buy Sugartree's old leases, since the

driftmouth of the Sugartree mine was very close to the boundary of the J.M. Huber property leased by Richland. (Transcript of Hearing AR p. 677-678, 861, Sixth Circuit App. p. 135-136, 236). Sugartree has no contracts or agreement with Richland and therefore no legal right to go on to Richland's leasehold property. (Transcript of Hearing, AR p. 674, Sixth Circuit, App. p. 134). All of Sugartree's operations were to the left of the driftmouth. (Transcript of Hearing AR p. 997-978, Sixth Circuit App. p. 317-318). Richland Coal Company purchased these leases simply to get access to its property through this same driftmouth. (Transcript of Hearing AR p. 677-678, Sixth Circuit App. p. 135-136). It had no intention to, nor did it actually, mine any coal from the Sugartree leases. It simply used the Sugartree driftmouth (opening) as an access way and, once into it, made its operation to the righthand side of the leasehold property.

(Transcript of Hearing AR p. 677-679, Sixth Circuit, App. p. 135-137). Richland did this by agreement with a company which was already its contract miner in another mine, Terco, Inc. (Transcript of Hearing, AR p. 680, Sixth Circuit App. p. 138).

Terco, Inc., under its contract with Richland, proceeded to mine the J.M. Huber property on which Richland held leases. It did so with different equipment, a completely different mining method (shooting from the solid used by Terco, as opposed to a mechanical continous mining machine used by Sugartree), and with a substantially different work force. (Transcript of Hearing AR p. 999-1001, 1002-1003, 980-983, Sixth Circuit App. p. 319-320, 321-323, 300-303). However, Terco, Inc. did, of course, use the same driftmouth as Sugartree had. (Transcript of Hearing, Sixth Circuit App. p. 317-318).

Sugartree, as previously mentioned, shut down, and laid off its employees.

Almost all of the former Sugartree employees filed applications with Terco but only some were hired. (Transcript of Hearing AR p. 1002-1003, Sixth Circuit, App. p. 321-322).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE COMMISSION AND THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT THE APPELLANT, TERCO, INC., WAS A SUCCESSOR CORPORATION TO SUGARTREE CORPORATION.

Finding Terco to be a successor represents a drastic expansion of this Court's previous holdings regardings successorship. This defintive case the scope of which established and defined successorship was of course Golden State Bottling Company, Inc., v. N.L.R.B., 414 U.S. 168, 38 L.Ed. 2d 388, 94 S.Ct. 414 (1973). It is vital to note that the fact situation in Golden State Bottling involved the purchase by the "successor" company of the assets of the "predecessor" company. See supra. In Golden State Bottling the Court discussed in

considerable detail why it found it to be liable for the unfair labor practices of a predecessor. See supra. In the course of this discussion, the Court stated that:

> "The imposition of this responsibility upon even the bonafide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices." (footnotes ommitted). 414 U.S. at 171-172, n. 2, 94 S.Ct. at 418-419, n. 2.

Both the rationales for why it is fair to hold the successor responsible for the acts of its predecessor apply in the instant case. Terco, Inc., was operating prior to the extinction of Sugartree Corporation. (Transcript of Hearing, Ar p. 960, Sixth Circuit App. p. 292). Terco, Inc. did not lease or purchase any of the Sugartree's stock, assets, equipment or anything else. Sugartree

simply went out of business. (Transcript of Hearing, AR p. 881-884, 999, Sixth Circuit, App. p. 254-257, 319). Terco, Inc. then following Sugartree's demise, began to operate a mine at the site of the former Sugartree mine. In fact, Terco did not even begin to mine the same property Sugartree had. Instead, Terco merely used the same driftmouth (opening) as had Sugartree, in order to mine a different area of coal, leased from a different mineral owner, by use of a different method of mining, using different equipment. (Transcript of Hearing, AR p. 677-78, 999-1000, Sixth Circuit App. p. 135-136, 319-320). Thus, in the instant case, Terco did not benefit by the unfair labor practice, nor could it protect itself by an indemnity clause or by a price adjustment for the assets purchased, as per the Golden State Bottling rationale. See supra.

The question before the Court, is

then whether to expand the doctrine of successorship beyond the scope it was given in Golden State Bottling, to find successorship where no purchase (or even lease) exists. While a considerable number of circuit court of appeal cases exist upholding findings of successorship, these cases invariably deal with situations in which the "successor" had leased or purchased the assets of its predecessor, see E.E.O.C. v. MacMillian Bloedel Containers, Inc., 503 F. 2d. 1086 (6th Cir., 1974). In the instant case, the Court of Appeals for the Sixth Circuit takes the substantial additional step of finding successorship in absence of any finding of a purchase or lease of assets by the successor.

Golden State Bottling emphasized that in determining "successor" status the Court must balance the interest of industry, the employer, the injured employee. See supra. The Petitioner would submit that the Sixth Circuit's

opinion in the instant case shifts the burden too heavily upon the employer and industry in general with the purchase requirement gone, it becomes a far more complex decision by an employer to determine when he is potentially liable as a successor. If anytime a business begin to use a location or facility previously used by another business or hires some new employees formerly employed by someone else, they are potentially liable for another company's wrongful labor practices, and tremendous burden is placed upon companies and commerce.

It is the Petitioenr's position that pursuant to Golden State Bottling, a court cannot even reach the nine step analysis set out in Howard Johnson to determine successorship unless a purchase or at least a lease of assets has occurred. Howard Johnson Co., Inc. 417 U.S. 256, 94 S. Ct. 2236. However, even if this test is used the Petitioner would submit it is not a successor as defined in Howard

Johnson. That test is as follows:

> 1) Whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product. Howard Johnson Co., Inc., supra 417 U.S. at 256-258, 94 S.Ct. 2236; Golden State Bottling Co., Inc., supra, 414 U.S. at 170-171, 184, 94 S.Ct. 414)(503 F. 2d. 1086, (6th Cir., 1974).

Regarding 1, as already discussed, since no purchase occurred between Terco and Sugartree, it is hard to see how Terco could have been on Notice that it might be liable for Sugartree's labor misdeeds. As regards to 3 and 4, as previously discussed, the only continuity of operation or plant is the use of the same driftmouth (opening). (Transcript of Hearing, AR. p. 999, Sixth Circuit App. p. 319). As regards to 5, as previously

discussed, Terco does not use the same work force as Sugartree. (Transcript of Hearing, AR p. 1002-1003, 980-983, Sixth Circuit App. p. 321-322, 300-303). As regards to 7 and 8, again as previously discussed, Terco uses a different mining method with different equipment, involving different jobs from those which existed at Sugartree. (Transcript of Hearing, AR p. 999-1001, Sixth Circuit App. p. 319-320). Of the mine factors, only 2 and 9 can be found present.

Finally, in regard to the similarity of work force between Sugartree and Terco, and important point must be discussed. The Sixth Circuit Court of Appeals upheld the Commission finding that under the nine factor test Terco was a successor of Sugartree, on the basis of the Commission's finding that 13 of the 15 employees hired by Terco had been employed by Sugartree and that 50% of the Terco work force once worked for Sugartree. (Opinion of Sixth Circuit, p. 8) However,

nowhere in the record do the facts appear. The pages of the testimony and exhibits cited by the Commission in its decision as supporting this finding simply do not contain any facts from which it could be inferred that 13 of the 15 employees hired by Terco once worked for Sugartree. Nor do such facts appear anywhere else in the record. The Commission cites the Petitioner's Trial Brief as proof that 50% of Terco's employees once were Sugartree's employees. However, nowhere in the evidentiary record does this fact appear. (Commission opinion, App. p. 47).

CONCLUSION

WHEREFORE, the Petitioner prays that the Court issue a Writ of Certiorari in this case.

Respectfully submitted,

Carlos R. Morris

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CERTIFICATE

I hereby certify that the original and 40 copies were mailed to the Office of the Clerk, U.S. Supreme Court, Washington, D.C. 20543, and that 1 true and correct copy was mailed to Hon. Vicki J. Shteir-Dunn, U.S. Department of Labor, Office of the Solicitor, 4015 Wilson Boulevard, Suite 400, Arlington, VA 22203, and Hon. Joseph Ferrera, Federal Mine Safety and Health Review Commission, 1730 K. Street, N.W., Sixth Floor, Washington, D.C. 20036, this the 2nd day of May, 1988.

Carlos R. Morris

HON. CARLOS R. MORRIS

APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW

COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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DISCRIMINATION PROCEEDING

DOCKET NO. KENT 84-255-D

MSHA CASE NO. BARB 84-35

SUGARTREE NO. 1 MINE

DECEMBER 10, 1985

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
ON BEHALF OF JAMES
CORBIN, and A.C. TAYLOR,
Complaints

V.

SUGARTREE CORPORATION,
TERCO, INCORPORATED, AND
RANDAL LAWSON,
Respondents

DECISION

Appearances: Carole M. Fernandez, Esq.,

Office of the Solicitor,
U.S. Department of Labor,
Nashville, Tennessee for
Complainants;
Guy E. Millward, Jr., Esq.,
Barbourville, Kentucky for
Sugartree Corporation, Hubbs
Creek Corporation, and
Randal Lawson; and
Carlos R. Morris, Esq.,
Barbourville, Kentucky for
Sadd Coal Company, Inc., and
Terco, Incorporated,

Before: Judge Melick

This case is before me upon the Complaint by the Secretary of Labor on behalf of the James Corbin, Robert Corbin, and A. C. Taylor under section 105 (c) (2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act," alleging that these miners were discharged from the Sugartree Corporation

(Sugartree) on July 6, 1984, in violation of section 105 (c) (1) of the Act.1/

On April 30, 1985, the Secretary sought to amend his complaint by alleging that Randal Lawson was also a "person" responsible for the claimed unlawful discharge of the three miners and that Terco Incorporated (Terco), Sadd Coal Company, Inc., and Hubbs Creek Corporation were "alter egos" and /or successor corporations to Sugartree and as such

---

1/ Section 105 (c) (1) of the Act provides in part as follows: "No person shall discharge . . . or cause to be discharged or otherwise interfere with the exercise of the statutory rights of any miner . . . in any . . . mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a Complaint notifying the operator or operators agent . . . of an alleged danger or health violation in a mine . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act."

were jointly and severally liable for damages suffered by the individual complainants. The Secretary also asserts in his amended complaint that the named business orgainzations, as successors or "alter-egos" to Sugartree, must reinstate the individual complainants to positions equivalent to the positions they formerly held with Sugartree sinc Sugartree was no longer in business. Joinder was initially permitted for purposes of consolidated proceedings on the merits and to receive evidence on the Motion to Amend. For the reasons set forth in this decision the Secretary's Motion to Amend is granted so as to allow retroactive joinder of Terco and Randal Lawson as party respondents in this proceeding but is denied as to Sadd Coal Company, Inc., and Hubbs Creek Corporation. Rule 19, Fed. Rules Civ. Proc. applicable by virtue of Commission Rule 1 (b), 29 C.F.R. 2700.1 (b).

In order for the Secretary to

establish a prima facie violation of section 105 (c) (1) of the Act, he must prove by a preponderance of the evidence that the individual complainants engaged in an activity protected by that section and that their discharge or removal from Sugartree was motivated in any part by the protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC2786, (1980), rev'd on other grounds sub nom Consolidation Coal Company v. Marshall, 663 F. 2d. 1211, (3d Cir. 1981). See also Boitch v. FMSHRC, 719 F.2d 194 (6th Cir.) 1983), and NLRB v. Transportation Management Corporation, 462 U.S. 393 (1983), affirming burden of proof allocations similar to those in the Pasula Case.

The undisputed evidence shows that on the Friday before the 1984 4th-of-July; vaction at the Sugartree No. 1 underground mine, James Corbin, the day shift continous miner operator, reported a problem with the water sprays on the

coninuous miner to Joe Watkins, the general mine foreman. Upon returning to work on July 5, Corbin found that the water sprays had still not been repaired and, as a result, dust created by the operation of the continuous miner was "hitting the fact" anmd envelopine Corbin and other miners working in the entry. Corbin explained that the miner was of necessity also cutting 2 to 4 inches of rock in the process thereby mixing large quantities of rock dust with the coal dust. In addition, the ventilation was insufficient to remove the dust from the work area. The dust was particularly severe to the right of the continuous miner where A.C. Taylor and James' brother, Robert Corbin, were working.

Corbin and the others complained about the dust to face boss James Proffit. It was so thick and the visibility so limited that the miners were unable to properly test roof conditions as

they progressed and were unable to see the continuous miner as it moved in close proximity to the men. In particular James Corbin was unable to see the other miners he was operating thereby making it difficult to avoid hitting them.

Profitt reported these initial complaints by the mine telephone to the outside to Mine Foreman Watkins. Watkins reportedly told the men to correct the problem by clamping off the spray bar. The bar was then clamped but the sprays even then did not work. Corbin testified that he was able to make about nine cuts with the continuous miner before the dust got so bad that he got sick and started "throwing up." His eyes were extremely irritated and he could see nothing. Corbin again complained to Proffit who again telephone the complaint to Watkins. Watkins then told Proffit to tell the men to "cut coal or go home". The entire work crew of 7 decided to go home rather than work under these conditions.

Robert Corbin was working as a

jack setter adjacent to the rib on the right side of the continuous miner and only 4 feet from the fact. He too complained because of the dust conditions. According to him it was so bad you could not see your out-stretched hand. Even though he wore a painters dust mask his lungs were "burning" from the dust. A.C. Taylor was also working on the right side of the continuous miner that day but as a timberman. According to Taylor the dust was so thick that it filled his eyes,lungs, and nose. He could "neither breathe nor see".

Jerry Bray, then a floating foreman for Sugartree, acknowledged that the conditions were extremely dusty and were therefore hazardous. In particular he found that the right side of the entry was not ventilating properly. Everbody working in the entry was complaining about the dust but the three miners working on the right side were exposed to more dust and were complaining more.

The sprays on the continous miner were thereafter fixed and the three complainants worked the next day. At the end of the day however, Mine Foreman Joe Watkins, issued each a lay-off slip indicating thereon that the men were being "laid-off because of a sharp decline in production". According to James Corbin, however, Terry McCreary, then vice-president of Sugartree, said they were discharged because they had not run coal the day before. James Proffit, the faceboss, told James Corbin that management wanted to know who was doing the "crying" in the mine and Proffit reportedly told Watkins that it was the "right side" meaning Taylor and the Corbin brothers. James Corbin explained that the righth side of the continuous miner was the most seriously affected by the dust because the dust was drawn that way by the ventilation. Robert Corbin also asked Joe Watkins why they were laid-off and Watkins

reportedly said that it was because they "wouldn't work in the dust". McCreary also reportedly said they were laid-off because they would not work in the dust.

Mine Foreman Joe Watkins recalled getting calls from the face boss, James Proffit, on the day in question concerning the broken spray bar and the reluctance of the three complainants to work in the dust. He told Proffit to send the men home. Watkins claims that when he handed out the lay-off slips the next day he told the Corbins that he could not tell them whey they were laid-off, and that they should see "Cotton" (the nickname for Sugartree president, Randal Lawson) for an explanation. Watkins admits however that he told Lawson that it was the men on the right side and specifically James Corbin, Robert Corbin, and A.C. Taylor, who were complaining about the dust and refusing to work in it. It was only a short time later that Lawson came back with the lay-off slips for these same three miners.

Watkins admits that he and Lawson then also discussed hiring three new men to replace the Complainants. Lawson told Watkins that he would replace them by the next Monday. Indeed a new miner operator and jack setter were immediately hired and several days later another jack setter was hired.

Randal Lawson, president and sole owner of Sugartree at the time of the "lay-offs" admittedly discussed the "lay-offs" with both Joe Watkins, the mine foreman and Mathew Logan, superintendant of operations. Lawson admitted that before he "laid-off" the complainants Watkins told himt hat those were the three who had been complaining about the excessive dust and that indeed his decision to "lay-off" the complainants was made "because they were the ones that complained". He also admists that he then told Watkins that he would obtain replacements for the three.

Within this framework of evidence it is clear beyond all doubt that Randal Lawson "laid-off" the three complainants on July 6, 1984, based solely on their protected safety complaints and/or their protected refusal to work in the face of clearly hazardous conditions.2/ There is no dispute that the complainants refusal to work under the circumstances was based upon a good faith reasonable believe that the continuance of the work under the conditions presented would have been hazardous. See Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981).

2/ MSHA roof and ventilation specialist Roger Dingess also inspected the Sugartree mine on July 10, 1984, and found that the ventilation continued to be seriously inadequate and was in violation of the ventilation plan. He also found that the sprays on the continuous miner were not then working properly and excessive dust was in suspension. In addition to the long tern health hazard associated with miners breathing respirable dust Dingess observed the immediate hazards caused by lack of visibility and the effects of coughing and vomitting caused by inhaling and ingesting the rock dust.

Accordingly, both Randal Lawson as an individual and the Sugartree Corporation, for which Randal Lawson was agent, are "persons" who unlawfully discharged the complainants under Section 105 (c) (1) of the Act. See footnote 1, supra. For the above reasons Randal Lawson was also properly joined as a party respondent by the amended complaint filed by the Secretary. Rule 19, Fed. Civ. Proc.

Fashioning a remedy in this case through the award of damages and reinstatement has been complicated by what must be construed as evasive efforts by Mr. Lawson and his associates. Indeed it appears that on the same day that two of the complainants presented an Order of Temporary Reinstatement issued by the Commission's Chief Judge to representatives of Sugartree, Sugartree ceased mining operations and many of the same principals, supervisors and employees continued mining operations in essentially the same mine under the name of Terco. At

the time of hearings Sugartree apparently had no assets and was not engaged in any mining activity. The Secretary accordingly has alleged in his Amended Complaint that an appropriate remedy of damages and particularly of reinstatement cannot be fully obtained without the joinder of Terco as a successor to Sugartree. Rule 19, Fed. Rules Civ. Proc.

In resolving the question of successorship in Munsey v. Smitty Baker Coal Company, Inc., et al, 2 FMSHRC 3463 (1980), the Commission applied the factors used by the Federal Courts in EEOC v. McMillan Bloedel Containers Inc., 503 F. 2d 1086, 1094 (6th Cir. 1974). These factors are: (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether the uses

the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same work conditions, (8) whether he uses the same machinery equipment and methods of production and (9) whether he produces the same product.

There is no dispute that when mining operations shifted from Sugartree to Terco in July, 1984, Randal Lawson was president and Carol McCreary was secretary/treasurer of both Sugartree and Terco. Thus whatever notice these agents of Sugartree had they also had that notice as agents of Terco. Since the initial complaints were filed by the individual miners with MSHA on July 12, 1984, and an investigation was thereafter conducted by MSHA it may reasonably be inferred that Terco had notice that changes of unlawful discrimination had been made. Indeed since Mr. Lawson was the perpetrator of what he should have known was a violation

of the Act he should not now be heard to complain that he, as president and agent of both Sugartree and Terco, did not have notice of the corresponding liability under the Act of both Sugartree and Terco. Under the circumstances I find that Terco in fact did have notice of the charges.

Since Sugartree admittedly has no assets and is apparently no longer engaged in any business activity it is clear that it could not provide relief either through monetary damages or reinstatement. I also find that a substantial continuity of business operations was maintained from Sugartree to Terco. Indeed the mine foreman for both Sugartree and Terco, Joe Watkins, testified that he only learned of the changeover when the former vice president of Sugartree and subsequent president of Terco, Terry McCreary, told him. Watkins testified that he saw no other noticeable change except the method of mining changed around that time of

"shoot from solid". Watkins testified that six of seven or about one-half of the employees of Sugartree also continued working for Terco.

Watkins also observed that under Terco they continued to use the same mine entrance although they began closing off the left side of the mine and prepared to mine the right side. There was apparently only a brief delay necessitated by preparatory matters relating to ventilation before coal production continued. It is observed that the original ventilation plan submitted by Sugartree includes both the right side and the left side of what has been identified as the Sugartree No. 1 Mine. The evidence also shows that Terco began operating on the right side under the same mine identity that had been filed with MSHA by Sugartree. Within this framework it is clear that Terco continued to mine coal from essentially the same mine as Sugartree using substantially the same

workforce and supervisory personnel.

While the evidence shows that the method of mining followed by Terco, known as "shooting from the solid"differed from the method differed from the method followed by Sugartree, i.e., continuous mining, this change was not significant. while Terco would not have needed a continuous miner operator under this method ofmining it is clear that the same personnel could have been used in other capacities for which they had been trained. Within the above framework of evidence it is clear that Terco was a successor business entity and accordingly is jointly and severally liable for the illegal acts of discrimination in this case. Accordingly the Secretary's Motion to Amend by also including Terco, Incorporated as a party respondent is also granted. Rule 19, Fed. Rules Civ. Proc. The Motion to Amend to Join Sadd Coal Company, Inc. and Hubbs Creek Corporation is denied since the Secretary has not

shown that with the joinder of Terco and Randal Lawson complete relief could not now be accorded to the complainants. Rule 19, supra.

ORDER

Terco Incorporated is hereby ordered to immediately reinstate James Corbin, Robert Corbin, and A.C. Taylor to the same (or comparable) positions they held at the time of their "lay-off" on July 6, 1984, at the Sugartree Corporation. It is further ordered that the Secretary of Labor immediately confer with the Sugartree Corporation, Terco, Incorporated, and Randal Lawson, through their representatives if applicable, to determine the amount of costs, damages, and interest due as a result of the unlawful discharges found in this case. The Secretary shall thereafter file with the undersigned a written report of such consultations on or before December 31, 1985. This decision is not a final

disposition of this case and no final disposition will be made until such time as the issue of costs, damages and interest are resolved.

CIVIL PENATLY

In light of my findings herein that Randal Lawson discharged James Corbin, Robert Corbin, and A.C. Taylor in clear violation of section 105 (c) (1) of the Act and that he knew or should have known that when he discharged those individuals he was doing so in violation of the Act, I find that a high degree of negligence was involved. The violation was quite serious in that the individual miners asserting their rights under the Act unlawfully lost their source of work and income. The violation not only had an immediate economic and social impact upon the individual miners but also had the effect of deterring others from asserting their rights under the Act. The violation was accordingly quite serious. I consider that the responsible parties were of small

size and had no history of prior violations of section 105(c). Wherefore Sugartree Corporation, Terco Incorporated and Randal Lawson will be, upon final disposition of these proceedings, jointly and severally ordered to pay civil penalties in the amount of $1,000.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW

COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10TH FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

JANUARY 10, 1986

DISCRIMINATION PROCEEDING

DOCKET NO. KENT 84-255-D

MSHA CASE NO. BARB 84-35

SUGARTREE NO. 1 MINE

SECRETARY OF LABOR,	:
MINE SAFETY AND HEALTH	:
ADMINISTRATION (MSHA)	:
ON BEHALF OF JAMES	:
CORBIN, and A.C. TAYLOR,	:
Complaints	:
V.	:
SUGARTREE CORPORATION,	:
TERCO, INCORPORATED, AND	:
RANDAL LAWSON,	:
Respondents	:

DECISION

Appearances: Carole M. Fernandez, Esq.,
Office of the Solicitor,
U.S. Department of Labor,
Nashville, Tennessee for
Complainants;
Guy E. Millward, Jr., Esq.,
and D. Randall Jewell, Esq.,
Barbourville, Kentucky for
Sugartree Corporation and
Randal Lawson, and
Carlos R. Morris, Esq.,
Barbourville, Kentucky for
Terco, Incorporated.

Before: Judge Melic

By decision dated December 10, 1985, the Respondents herein were found jointly and severally liable for costs and damages resulting from the unlawful discharge of the named Complainants under section 105(c)(1) of the Federal Mine Safety and Health act of 1977, 30 U.S.C. 801 et seq., the "Act". Hearings were thereafter held on the issue of costs and damages on January 2, 1986, in London, Kentucky.

A backpay damage award is the sum equal to the gross pay the miner would have earned but for the unlawful discharge, less his actual "net interim earnings." Bradley v. Belva Coal Company, 4 FMSHRC 982 (1982) 126 (1982). "Net interim earnings" is an accepted term of art which does not refer to net earnings in the usual sense (gross pay minus various withholdings). Rather, the term describes the employees gross interim earnings less those expenses (if any) incurred in seeking and holding the interim employment - expenses that the employee would not have incurred had he not suffered the unlawful discharge. Belva Coal Company, supra.

It is undisputed that at the time of their unlawful discharge from Sugartree Corporation (Sugartree), each of the individual Complainants regularly worked 9 hours a day, 5 days a week and $14.75 an hour for the additional 5 hours a week overtime. They also worked one Saturday a

month in return for major medical insurance coverage under a Blue Cross and Blue Shield policy. According to former Sugartree president, Randal Lawson, this coverage cost $200 per month for each employee. This amount is to be included in the backpay award as a fringe benefit that was an integral part of the Complainants wage-benefit package at Sugartree. Northern Coal Co., supra.

The backpay computation based upon the stated earnings and fringe benefits should commence on July 6, 1984, the date the Complainants were unlawfully discharged and should terminate but not include the date of reinstatement or waiver of reinstatement i.e., January 6, 1986. At hearings on January 2, 1986, James and Robert Corbin accepted reinstatement to successor mine operator Terco, Incorporated commencing January 6, 1986. At the same proceedings A.C. Taylor waived his right to reinstatement because

he had obtained preferable alternative employment.

Robert Corbin also suffered specific losses from his unlawful discharge because he was thereafter required to twice refinance a jeep automobile because of his inability to make the higher monthly payments. According to the Bank of Williamsburg, Mr. Corbin will be required to pay $1,240.84 in additional finance charges because of this refinancing. That amount is properly chargable as damages in these proceedings and interest should be charged on that amount in accordance with the costs noted in Exhibit D-G-6. See Secretary ex. rel. Noland v. Luck Quarries, Inc., 1 FMSHRC 2426 (1980).

Respondents have the burden of proving mitigation of damages including interim earnings. NLRB v. Izzi, 395 F. 2d 241 (1st Cor., 1968); and NLRB v. Mastro Plastics Corp., 354 F. 2d 170 (2nd Cor, 1965), cert. denied 384 U.S. 972 (1966).

In this case the Secretary produced each of the individual Complainants as witnesses who testified concerning their interim earnings. While some of this testimony is vague and imprecise, Respondents have produced no contradictory evidence. Accordingly I accept the testimony of the individual Complainants as to their interim earnings as best as can be reconstructed. Where there is any uncertainty I have accepted thelarger amount of interim earnings thereby reducing the liability of Respondents. There is also evidence in this case that the Complainants had received various amounts of unemployment compensation and food stamps. These amounts are not however generally considered to be "earnings" to be deducted from backpay awards. Boitch v. FMSHRC and Neal, 704 F. 2d 275 (6th Cir. 1983); NLRB v. Marshall Field and Company, 318 U.S. 253, 255 (1943); NLRB v. Gullet Gin Company, 340 U.S. 361, 369 (1951).

JAMES CORBIN

$1,000 should be deducted as interim earnings for amounts James Corbin received in 1984 from Dick Hall who was apparently superintendant of a now defunct coal mine operator. Although Corbin concedes that this amount was paid for work performed during 1984 he maintains that it was a "loan" from Dick Hall to cover a "cold check" issued by the mine operator. Since the "loan" apparently does not have to be repaid until themine operator finally makes good on his check to Corbin and since there is no formal evidence of debt I consider this amount as interim earnings to be deducted from the backpay award.

During the first quarter of 1985, James Corbin earned $1,800 from the Girdner Mining Company. During the second quarter of 1985 he earned $500 at the AA Coal Company and $600 at the Fair Lady Coal Company. He earned $2,400 at the Big Fanny Coal Company during the third quarter of 1985, and during thefourth

quarter of 1985 he received $560 for work performed for Junior Helton. As of the date of hearing he continued to work for Junior Helton and presumably continued to earn a maximum of $350 per week.

ROBERT CORBIN

It is not disputed that Robert Corbin had no interim earnings during 1984. The evidence shows that in the first quarter of 1985 he earned $1,449 from the Girdner Mining Company and that during the second quarter 1985 he earned $1,446 from the Fair Lady Coal Company. Thereafter, and presumably during the third quarter of 1985, Robert Corbin worked part time at the Ellison Funeral Home as a grave digger earning $1,500. During the fourth quarter of 1985 he earned $1,800 from the H&R Coal Company and as of the date of hearing continued to work for this company at $300 per week.

A.C. TAYLOR

According to check stubs in evidence,

Mr. Taylor had net interim earnings from the Girdner Mining Company during the fourth quarter of 1984 of $792 (Exhibit D-G-5). These check stubs show that Mr. Taylor had net interim earngings from the Girdner Mining Company during the first quarter of 1985 of $288. Since he testified to earning $380.27 from the Girdner Mining Company (Exhibit D-G-4) for that same period. I accept this larger amount as correct. Taylor also earned $627.47 from the G&S Mining Company during the first quarter of 1985. He had no earnings during the second and third quarters of 1985. During the fouarth quarter of 1985 commencing October 21, 1985, he was earning $350 per week. He continued to earn that amount through the date of the hearing.

ORDER

Within the framework of the findings in this decision the Secretary is directed to compute the total amount of damages and interest through January 31, 1986, to be

awarded the individual Complainants in this proceeding. Those computations shall be filed with the undersigned on or before January 25, 1986. The Secretary is also directed to file a status report on or before January 25, 1986, concerning the reinstatement of James and Robert Corbin. This decision is not a final disposition of these proceedings and such a disposition will not be made until the issues of costs damages, interest, reinstatement and the amount of civil penalty are finally resolved.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW

COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10TH FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

MARCH 30, 1987

DISCRIMINATION PROCEEDING

DOCKET NO. KENT 84-255-D

MSHA CASE NO. BARB 84-35

SUGARTREE NO. 1 MINE

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF JAMES CORBIN, and A.C. TAYLOR,	:
Complaints	:
V.	:
SUGARTREE CORPORATION, TERCO, INCORPORATED, AND RANDAL LAWSON,	:
Respondents	:

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,

Commissioners

DECISION

BY THE COMMISSION:

This discrimination proceeding arises under section 105 (c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982). 1/ Terco, Inc. ("Terco"), seeks review of a decision by Commission Administrative Law Judge Gary

---

1/ Section 105 (c) (1) of the Mine Act states in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative or miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine..., or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act]. 30 U.S.C. 815 (c) (1).

Melick finding Terco, as successor to Sugartree Corporation ("Sugartree"), liable for backpay and other costs determined to be due as a result of Sugartree's discriminatory discharge of the complainants. 8 FMSHRC 206 (February 1986) (and appendices) (ALJ). For the reasons set forth below, we affirm.

Sugartree was owned by Randal Lawson, who was also its president. In July, 1984, Sugartree operated the Sugartree No. 1 coal mine in Knox County, Kentucky. On thelast workday prior to the July 4, 1984 holiday, and again on July 5, 1984, Sugartree miners James Corbin, Robert Corbin, and A.C. Taylor complained to their section foreman and to mine foreman Joe Watkins that malfunctioning watersprays on the continuous mining machine were creating a severe dust and ventilation hazard in the section where the miners were working. On July 5, 1984, after unsuccessful repair efforts, Watkins ordered the crew of seven or eight miners

to continue working, but the entire crew left the mine rather than work under the existing dusty conditions. The crew returned to work the next day and, at the end of their shift, Watkins issued to the Corbins and Taylor lay-off slips that attributed dismissal "to the sharp decline in production during the last several weeks." No other miners were laid-off. Lawson testified that he had picked these three miner for lay off because "they were the ones that [were] complaining..." Tr. 406. 2/

On July 12, 1984, the three miners filed complaints of discriminatory discharge with MSHA. 30 U.S.C. 815 (c)(2). Shortly thereafter, in July 1984, Sugartree ceased mining operations and

---

2/ On July 10, 1984, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted a ventilation inspection at Sugartree No. 1 mine and issued to Sugartree two citations, one of which alleged that the water pressure in the continuous miner's spray system was lower than required by the mine's ventilation plan.

Terco began mining at the same mine. On september 15, 1984, Terco, pursuant to 30 C.F.R. Part 41, submitted to MSHA a legal identity report for the "Terco No. 2 Mine" that bore the same mine I.D. number as the Sugartree No. 1 MIne. The report listed Randal Lawson as president of Terco.

On September 25, 1984, the Secretary of Labor filed with the Commission applications for temporary reinstatement of the complainants. 30 U.S.C. 815(c)(2); 29 C.F.R. 2700.44 (1984). Two days later Commission Chief Administrative Law Judge Paul Merlin issued orders of temporary reinstatement directed to Sugartree. Shortly after receiving copies of Judge Merlin's order, the two Corbins went to the mine to be reinstated but were informed that they would have to apply to Terco for employment. On October 3, 1984, the Secretary moved to amend the reinstatement orders by including Randal Lawson and Terco as parties. However, no further action concerning temporary

reinstatement was taken pending determination of Terco's liability. A subsequent legal identity report for Terco and the Terco No. 2 mine, submitted on February 2, 1985, listed Terry McCreary as president and Carol McCreary as secretary. Both McCrearys had served previously as officers of Sugartree, Terry McCreary as vice-president and Carol McCreary as secretary-treasurer.

On December 27, 1984, the Secretary filed a discrimination complaint against Sugartree on behalf of the three complainants. 30 U.S.C. 815(c)(2). In April 1985, following prehearing discovery, Judge Melick permitted the Secretary to amend the complaint to add Lawson and Terco as respodents.

After a hearing on the merits, the judge concluded that the complainants had been discharged from their jobs in violation of section 105(c)(1) of the Mine Act. In reaching this conclusion, the

judge found that the complainants had made protected safety complaints regarding both the defective water spray on the continuous mining machine and the unhealthy dust conditions in the working section of the mine and had engaged in a protected work refusal. 8 FMSHRC at 209-12. He further determined that the complainants were laid off permanently, i.e., discharged "based solely on their protected safety complaints and/or their refusal to work in the face of clearly hazardous conditions." 8 FMSHRC at 211-12. The Judge found that Randal Lawson, as an individual, and Sugartree, for which Lawson was an agent, were responsible for the unlawful discharges and, consequently, were liable for violating complainants' rights under the mIne Act. 8 FMSHRC at 212. The Judge further determined that Terco was Sugartree's successor and, as such, was jointly and severally liable for remedying the illegal discrimination. 8 FMSHRC at 212-14. The judge assessed a

$1,000 civil penalty against Sugartree, Terco, and Lawson for the violation of section 105(c)(1), ordered them to pay approximately $35,000 in back pay and interest to each of the complainants, and directed Terco to reinstate immediately the complainants either to the same positions held at the time of their illegal discharges or to comparable positions. 8 FMSHRC at 206-07, 214-15. 3/

3/ Terco thereafter reinstated the Corbins. Complainant Taylor waived reinstatement because he had obtained other employment. On July 23, 1986, the Secretary filed new discrimination complaints on behalf of the Corbins, alleging that they had again been discharged illegally by Terco. FMSHRC Docket Nos. KENT 86-131-D & 86-132-D. The cases were assibned to Judge Melick and ultimately became the subject of a settlement agreement between the Secretary and Terco, under the terms of which Terco agreed to pay the Corbins $50,000 damages and the Corbins agreed to waive any right to reinstatement by Terco. The Secretary agreed to "forego any enforcement action on behalf of the Corbins" in the instant proceeding. However, the settlement agreement also stated that in this present proceeding the Secretary would "take all action necessary to enforce the award on behalf of A.C. Taylor," who was not a party to the agreement. Based ont he settlement, Judge Melick allowed the

Secretary to withdraw the new discrimination complaints and dismissed those proceedings. 9 FMSHRC 24 (January 1987) (ALJ). The Secretary then moved the Commission to vacate the portion of the Commission's directions for review in the pending proceeding pertaining to liability and remedial issues affecting the Corbins. We granted the motion, but emphasized that all liability issues (including the question of successorship) and all personal remedy issues insofar as they affect...A.C. Taylor, remain for decision." 9 FMSHRC __, slip op. at 2 (February 10, 1987).

Terco was the sole respondent to seek review of the judge's final decision. Terco has raised no question on appeal regarding the validity of the judge's findings of unlawful discrimination or the responsibility of Lawson and Sugartree for the violation. The sole question before us concerns the derivative liability of Sugartree's alleged successor, Terco.

To determine whether Terco was liable for the damages stemming from Sugartree's discrimination, the judge applied the successorship doctrine enunciated by the Commission in Glenn Munsey v. Smitty Baker Coal Co., 2 FMSHRC 3463 (December 1980),

aff'd in relevant part, rev'd in part on other grounds sub nom. Munsey v. FMSHRC, 701 F. 2d 976 (D.C. Circ. 1983), and analyzed the case according to the nine factors set forth in Munsey (see 2 FMSHRC at 3465-66) for determining successorship status. 8 FMSHRC at 212-14. In particular, the judge found as follows: Terco had notice of the charges of discrimination; Sugartree could not provide remedial relief to the complainants; and a substantial continuity of business operations was maintained from Sugartree to Terco. 8 FMSHRC at 213-14. On the basis of these findings the judge concluded: "Terco was a successor business entity [to Sugartree] and accordingly is jointly and severally liable for [Sugartree's] illegal acts of discrimination in this case." 8 FMSHRC at 214.

In Munsey, this Commission noted that the statutory protection against discrimination afforded miners is similar

to the statutory protection afforded workers under other labor statutes. The Commission stated: "In certain circumstances, the protections of those other statutes have been construed to include the liability of bona fide purchasers and other successors for their predecessors' act of discrimination... and ... in appropriate cases the successorship doctrine should also be applied [by the Commission]..." 2 FMSHRC at 3465. Although Munsey was decided under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1976) (amended 1977) ("Coal Act"), the predecessor to the Mine Act, the discrimination protections afforded miners under the Mine Act are even greater than those afforded miners under the Coal Act, and the successorship doctrine clearly applies under the Mine Act as well.

In determining whether a successor should be required to remedy unlawful discrimination, consideration of a variety

of relevant liability and economic factors is appropriate. In Munsey, the Commission approved for consideration nine such factors:

> (1) whetherthe successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production and (9) whether he produces the same products.

2 FMSHRC at 3465-66 (restating factors set forth in EEOC v. MacMillan Bloedel Containers, Inc. 503 F. 2d 1086, 1094 (6th Cir. 1974). These and similar factors have been applied under both the Civil Rights Act of 1964 (e.g., MacMillan Bloedel, supra) and the National Labor Relationa Act (e.g., NLRB v. Winco Petroleum Co., 668 F. 2d 973, 976-78 (8th

Cir. 1982)).

The first two factors considered by the judge were whether Terco had notice of the complainants' charges when it acquired Sugartree's business operations and whether Sugartree was able to provide relief to the complainants. Substantial evidence supports the judge's findings that Terco's knowledge of complainants' charges may be inferred reasonably and that Sugartree was unable to provide relief. Legal identity forms submitted by Sugartree in July, 1984 and by Terco in September, 1984, listed Randal Lawson as president and Carol McCreary as secretary-treasurer of both companies. The complainants filed thier complaint of discrimination with MSHA on July 12, 1984, and MSHA's investigation of the complaint followed. We agree with the judge that the existence of identical corporate officers during this period is evidence that Terco had notice of the complainants' charges, particularly where, as here,

Lawson, by his own admission, discharged the complainants for an illegal reason, Terco cannot be heard to say that it lacked notice of potential liability arising from the illegal actions of its president at the time it succeeded to Sugartree's mining operation. As to the ability of Sugartree to provide relief, it is clear from the record that Sugartree ceased business activity and that its assets were sold to satisfy Lawson's personal debts. Tr. 432. Under these circumstances, complainants could not obtain reinstatement or monetary damages from Sugartree.

The seven other factors discussed in Munsey provide a framework for analyzing the crucial question of whether there was a continuity of business operations and work force between the successor and its predecessor. Here, the judge found that a substantial continuity in business operations was maintained from Sugartree to Terco, and the evidence substantiates

this finding. A comparison ofthe payroll records of Sugartree and Terco indicates that of the fifteen employees hired by Terco in July, 1984 for the Terco No. 2 mine (formerly the subject Sugartree mine), approximately thirteen were employed formerly by Sugartree. Ex. P-27; Tr. 488-491. Terco admitsthat approximately 50% of its total work force is composed of former Sugartree employees. T. Br. 3. Further, Terco continued to mine coal at the same mine and Sugartree's mine superintendent and section foreman remained with Terco. Although Terco made some changes in its mining methods and equipment, these changes were dictated primarily by the requirements of mining engineering and not by any substantial change in its business operation. Moreover, no change in personnel was required to effect these changes. Under these circumstances, we conclude that the judge properly found

that there was a substantial continuity in business operations between Sugartree and Terco.

Terco, citing Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), argues that only a successor who purchases the assets and stock of its predecessor with knowledge of the charges of discrimination may be held liable for remedy of the predecessor's illegal acts. Terco asserts that it did not make such a purchase but rather merely acquired Sugartree's coal leases. We reject this narrow reading fo the principles of successorship law. Golden State does not hold that the purchase of the assets or stock, ofthe predecessor by the successor is necessarily the determinative factor in establishing successorship. Rather, the Court merely emphasized that in cases like Golden State, which involve a bona fide purchaser, the successor may protect itself in the purchase arrangement against any potential liability. 414 U.S. 172-

174. Purchase of the assets or stock of the predecessor undoubtedly should be weighed in the mix of successorship factors when it is present. However, its absence does not negate a findings of successorship liability. As the Court recognized, successorship transactions may assume many forms and liability may obtain in a number of business contexts. 414 U.S. at 182-83 n. 5. See also Munsey, 2 FMSHRC at 3465.

Accordingly, we affirm the judge's decision and, in particular, his finding that Terco is a successor business entity to Sugartree jointly and severally liable for remedying the illegal acts of discrimination committed by Sugartree and Lawson. In light of the settlement agreement discussed above and the Commission's prior order vacating that portion of the direction for review in this case pertaining to the Corbins (n. 3 supra), Sugartree, Terco and Lawson are directed to immediately comply with that

portion of the judge's order directing payment of the monetary damages to A.C. Taylor.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 87-3391; 87-3572

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TERCO, INC.; SUGARTREE CORPORATION; and RANDAL LAWSON,
Petitioners, Cross-Respondents,

v.

FEDERAL COAL MINE SAFETY AND HEALTH REVIEW COMMISSION; SECRETARY OF LABOR,
Respondents, Cross-Petitioners.

ON PETITION to Review and Cross Application to Enforce an Order of the Federal Coal Mine Safety Board.

Decided and Filed December 8, 1987

Before: GUY, NELSON, and BOGGS, Circuit Judges.

PER CURIAM. Petitioner, Terco, Inc., appeals from a final decision of the Federal Mine Safety and Health Review Commission (Commission).[1] The Secretary of Labor has filed a cross-petition seeking enforcement of the Commission's order.

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[1]Although the case style shows Sugartree and Lawson to be petitioners along with Terco, it appears only Terco has perfected a petition.

This litigation originally arose under section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c). The Mine Act was created to provide additional safety and health protection to miners. Section 105(c) is the anti-discrimination provision of the Mine Act and provides in pertinent part:

> (1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

Sugartree Corporation was the subject of a complaint filed with the Secretary of Labor (Secretary) alleging that three miners, James Corbin, Robert Corbin, and A.C. Taylor, had been discharged in retaliation for complaining about excessive dust levels in the Sugartree mine where they worked. Such a retaliatory discharge would have violated section

105(c) of the Mine Act. The Secretary filed a complaint on behalf of all three miners before the Conmission. An Administrative Law Judge (ALJ) to whom the case was assigned found that Sugartree had discriminated against the miners. More significantly, for the purposes of this appeal, however, the ALJ also determined that Terco was a successor to Sugartree and was also liable to the miners.[2] Reinstatement and back pay were ordered and a $1,000 civil fine was assessed.

Terco filed a petition for discretionary review with the Commission on the issue of successorship liability only. This petition was granted and, on March 30, 1987, the Commission issued its decision affirming the ALJ and holding Terco to be a successor to Sugartree.[3]

I.

The only question presented by this appeal is whether substantial evidence supports the Commission's determination that Terco, Inc. is a successor to Sugartree Corporation and, thus, liable to A.C. Taylor for damages. In order to answer this question, it is important to review not only the relationship between Terco and Sugartree but also the relationship among their principals.

In early July, 1984, A.C. Taylor was employed as a timberman at the Sugartree No. 1 mine in Knox County, Kentucky. Sugartree was owned by its president, Randal Lawson. Due to a malfunctioning water spray system, severe dust conditions existed in the mine. After unsuccessfully complaining, several miners, including Taylor and the two Corbins, walked off the job. Randal Lawson was informed by the job foreman that Taylor and the Corbins had been the most vigorous com-

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[2]The ALJ also found Randal Lawson the president of Sugartree, to be jointly and severally liable along with Sugartree and Terco.

[3]Prior to the Commission's decision, the two Corbins settled their case and are not further involved.

plainers and, the next day, the three were laid off indefinitely, ostensibly due to a decline in production.

At the time of the discriminatory layoff, Sugartree was operated in conjunction with other mining-related entities owned by the Lawson and McCreary families of Barbourville, Kentucky. Sugartree had been incorporated in June of 1983. At the same time, Sadd Coal Company, Inc. (Sadd) and Hubbs Creek Corporation (Hubbs) were also incorporated. Terco was not incorporated until one year later in June of 1984.

Nellie Lawson owned Hubbs and her husband, Randal Lawson, owned Sugartree. Carol McCreary owned Sadd and her husband, Terry McCreary, owned Terco. The offices of these corporations, with the exception of Sadd, were located at the mine site operated by Terco. The Sadd office was located at Nellie Lawson's house. Mrs. Lawson's house was also used for some of Sugartree's business operations.

Although each of the corporations was individually owned, the owners were also involved with all the other corporations. For example, Randal Lawson was president of all the corporations at the time they were founded. He remained president of Sadd and Terco until December, 1984; of Sugartree until late 1984; and of Hubbs until July, 1985. Nellie Lawson, as well as owning Hubbs, was secretary and treasurer of Sugartree at some period of time and performed various secretarial and bookkeeping duties for Sadd and Sugartree. Carol McCreary, the owner of Sadd, was also secretary and treasurer for both Sugartree and Terco and was a full-time paid employee of Hubbs. Terry McCreary, the owner of Terco, was the vice president of Sugartree. He also received salaries from both Sugartree and Sadd, and was on the Board of Directors of Hubbs.

Prior to June of 1983, Terry McCreary had also owned Little Poplar Heavy Equipment Sales and Service, Inc. (Poplar). Randal Lawson also worked at Poplar. Poplar had been oper-

ating the No. 1 mine; however, in July of 1983, Sugartree took over the operations. Sugartree operated the No. 1 mine in the same manner and with the same workforce as had Poplar. The workers were not even aware of the change until their July, 1983, pay stubs were received on which Poplar had been crossed out and Sugartree written in.

Randal Lawson's investment in Sugartree consisted of equipment he owned and leases he had for the mine. Sugartree also leased additional equipment from Hubbs. It was an accepted practice for Sugartree also to obtain equipment and parts from Hubbs, which was owned by Randal Lawson's wife, Nellie, without making an accounting of it.

When Sugartree initially began operations, it was mining only to the left of the mine entry and was using the continuous mining method. In June of 1984, supervisory personnel at Sugartree began considering mining from the right side of the entry as well, but with a different mining technique (shooting from the solid) which involved the use of explosives to extract the coal.

On September 27, 1984, Randal Lawson, as president of Sugartree, entered into a successor permit assignment agreement with Richland Coal Company whereby Sugartree transferred and assigned its mining permit for Sugartree No. 1 to Richland. The Sugartree production report indicates that coal production at the No. 1 mine ceased in September, 1984. No layoff slips were issued to Sugartree employees. The employees were informed in September, 1984, by Lawson, that Sugartree was out of business.

Also on September 27, 1984, an ALJ had issued orders for the reinstatement of Taylor and the two Corbins. James and Robert Corbin went to the mine to be reinstated the day after they received these orders. At that time, Terry McCreary, through an employee, told the Corbins that Terco was now operating the mine, and that they would have to file applications for employment with Terco in order to return to work.

The Corbins filed the applications as they were directed at the office which they had considered to be the office of Sugartree. The Corbins also picked up an application for Taylor; however, they told Taylor it would be useless to hand in the application since it was their impression that Terco would not put any of them back to work. This is what in fact occurred.

In December, 1985, a hearing was held before an ALJ on the complaint of discriminatory discharge of the Corbins and Taylor. The ALJ ruled in favor of the complainants and also ruled that Terco was a successor to Sugartree and found Sugartree, Lawson, and Terco to be jointly and severally liable. The Commission affirmed the ALJ on March 30, 1987.

II.

In finding Terco to be a successor to Sugartree, both the ALJ and the Commission relied upon the nine-factor successorship test enunciated in *Munsey v. Smitty Baker Coal Co.* 2 FMSHRC 3463 (1980), *aff'd in relevant part sub nom. Munsey v. Federal Mine Safety & Health Review Comm'n.*, 701 F.2d 976 (D.C. Cir.), *cert. denied sub nom. Smitty Baker Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 464 U.S. 851 (1983). The test set forth in *Munsey* was taken from *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974), where this court stated:

> Courts that have considered the successorship question in a labor context have found a multiplicity of factors to be relevant. These include: 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory

> personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

503 F.2d at 1094 (citations omitted).

The Commission considered each of the above nine factors and found them all to be satisfied. We agree. Without engaging in a complete review of the evidence as it relates to each of the nine factors, we find the following to be significant as to the relationship between Terco and Sugartree.

First, there was a complete identity of corporate officers and Lawson, as president, was the one responsible for the discharges. Thus, Terco clearly had notice of the nature of the discharges *and* the fact that complaints had been filed.

Second, it is clear that when Sugartree ceased operations and Terco took over, Sugartree was left without assets. It is obvious that Sugartree was left as a hollow shell and had no capacity to provide the relief ordered by the Commission.

Third, there was a substantial and obvious continuity of business operations between Terco and Sugartree. Of the nine *MacMillan Bloedel* factors, the courts are in agreement that this is the most important one. *See Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 751 (7th Cir. 1985). In examining the evidence on this issue, the Commission compared the payroll data of the companies and stated that 13 of the 15 employees hired by Terco had been employed by Sugartree. In addition, the Commission stated that Terco admitted that about 50 percent of its work force had worked for Sugartree, including Sugartree's superintendent and section foreman. Terco began operating the Sugartree mine only one week after Sugartree ceased operations. Although it is true that Terco mined the right side rather than the left and by a different mining technique, changes in these procedures were being considered by

Sugartree before it ceased operations. Additionally, the composition of Terco's workforce and the ease with which it began operations, without any significant change other than those that would have taken place even if Sugartree had continued to operate the mine, further demonstrate the continuity of business operations between Sugartree and Terco.

Fourth, the mining jobs under Terco existed under substantially the same conditions as they did at Sugartree. Terco vigorously contends that the mining methods were changed when it took over the No. 1 mine. However, as the Commission and the ALJ pointed out, the same personnel could be employed for either method of mining. The Corbins and Taylor all had experience in the "shooting from the solid" method. In fact, Sugartree had approached each of them prior to their discharges about their experience in the "shooting from the solid" method. The fact that much of Terco's workforce was comprised of former Sugartree employees demonstrates the interchangeability of the positions. Also, Terco continued to use the same equipment and machinery used by Sugartree to the extent possible.

Last, we note that the successor, Terco, certainly produced the identical product as did Sugartree. Coal production was the business of both companies.

Terco also places heavy reliance on the fact that there was no purchase of Sugartree's business by Terco. Although a sale or the lack thereof is certainly one of the factors to which a court can look, it is not in and of itself determinative. In fact, as is the case here, the lack of a sale may actually indicate that the predecessor and successor corporations are so closely linked that arms length dealings as usually occur during a sale never occur nor are they necessary.

Finding substantial evidence to support the Commission's findings, we AFFIRM and order enforcement of the Commission's orders.

NO. 87-3391
87-3572

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JANUARY 6, 1988

TERCO, INC., ET AL.,	:
	:
Petitioners,	:
Cross-Respondents,	:
	:
vs.	:
	:
FEDERAL MINE SAFETY AND HEATLH REVIEW COMMISSION, ET AL.,	:
	:
Respondents,	:
Cross-Petitioners	:

ORDER

Upon consideration of the Petitioner's Motion to Reconsider the Court's Order of December 8, 1987,

IT IS ORDERED that the Motion be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, CLERK

FEDERAL MINE SAFETY & HEALTH

ACT OF 1977

30 U.S.C. 815 (c)(2)

"Any miner or applicant for employment or representative of miners who believe that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occcurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the

complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, withservice upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an Order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to the subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited

to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his behalf during any hearing held pursuant to his paragraph."

Supreme Court, U.S.
FILED
JUL 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1808

In the Supreme Court of the United States

OCTOBER TERM, 1988

TERCO, INC., PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that substantial evidence supports the decision of the Federal Mine Safety and Health Review Commission that petitioner is a successor employer and therefore liable, under Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), to remedy its predecessor's retaliatory discharge of an employee.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 50-57) is reported at 839 F.2d 236. The opinion of the Federal Mine Safety and Health Review Commission (Pet. App. 32-49) is reported at 9 F.M.S.H.R.C. 394. The decisions of the administrative law judge (Pet. App. 1-21, 22-31) are reported at 8 F.M.S.H.R.C. 208 and 216, respectively.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1987. A petition for reconsideration was denied on January 6, 1988 (Pet. App. 58). The petition for a writ of certiorari was filed on April 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Terco, Inc., is the operator of a coal mine in Knox County, Kentucky, that was formerly operated by Sugartree Corporation (Sugartree). In July of 1984, at a time when Sugartree still operated the mine, the Secretary of Labor (the Secretary) received a complaint from three miners—James Corbin, Robert Corbin, and A.C. Taylor—alleging that, contrary to Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1), they had been unlawfully discharged in retaliation for complaining to Sugartree's managers about excessive dust levels in the mine. Pet. App. 12, 15, 51-54.[1]

On September 27, 1984, a Department of Labor administrative law judge (ALJ) ordered Sugartree to reinstate the discharged miners temporarily pending an adjudication of the merits of the complaint (Pet. App. 54). That same day, however, Sugartree ceased operations at the mine (*id.* at 13, 54). A week later, petitioner began operating the mine using many of the same principals, supervisors and employees (*id.* at 13, 17-18, 56). On December 27, 1984, the Secretary filed an administrative complaint against Sugartree alleging that the company had discriminated against the three miners (*id.* at 37). Thereafter, when it became apparent that Sugartree had ceased all mining activity and no longer held any assets, the Secretary amended the complaint to include petitioner as a successor to Sugartree (*id.* at 13-14).

The basic facts regarding the relationship between petitioner and Sugartree are undisputed. To begin with, the companies shared corporate officers. Legal identity forms

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[1] Section 105(c)(1) prohibits discrimination against a miner based on the filing of "a complaint notifying the operator or the operator's agent * * * of an alleged danger or safety or health violation in a coal or other mine * * *."

submitted by Sugartree (in July 1984) and by petitioner (in September 1984) listed Randal Lawson as president and Carol McCreary as secretary-treasurer of both companies (Pet. App. 44). In addition, Terry McCreary, petitioner's owner and subsequent president, had been the vice-president of Sugartree and received a salary from that company (*id.* at 37, 53).

Petitioner also employed many of Sugartree's former employees and, to the extent possible, used the equipment and machinery formerly used by Sugartree (Pet. App. 17-18, 56-57). Thirteen of 15 employees hired by petitioner in July 1984 for the mine previously operated by Sugartree were former Sugartree employees, and approximately 50% of petitioner's total work force had worked for Sugartree, including Sugartree's mine superintendent and section foreman (*id.* at 46, 56). From the standpoint of the employees, there was no noticeable change in employers; they were not issued layoff slips, but were informed by Lawson in September 1984 that Sugartree was out of business (*id.* at 16, 54).

Before ceasing operations, Sugartree mined the left side of the mine, using the so-called "continuous mining method" (Pet. App. 17-18, 54). Sugartree had also been considering mining the other side of the mine, using explosives to extract the coal (*id.* at 54), and it had approached the three later-discharged miners about their experience with the so-called "shooting from the solid" mining technique (*id.* at 57). When petitioner commenced operations at the same mine, if followed that course, "shooting from the solid" on the right side of the mine (*id.* at 17). No change in personnel was required to effect this change in methods (*id.* at 18, 46).

2. On December 10, 1985, an ALJ determined that Sugartree and Randal Lawson, its owner and president, had unlawfully discriminated against the complainants

when it discharged them following their complaints concerning severe dust conditions at the mine (Pet. App. 12-13). Applying the nine-factor test of successorship enunciated in *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974), and adopted by the Federal Mine Safety and Health Review Commission (the Commission) in *Munsey* v. *Smitty Baker Coal Co.*, 2 F.M.S.H.R.C. 3463 (1980), aff'd in relevant part and rev'd in part on other grounds, 701 F.2d 976 (D.C. Cir.), cert. denied, 464 U.S. 851 (1983), the ALJ further concluded that petitioner was a successor corporation to Sugartree (Pet. App. 14-18). Specifically, the ALJ found that because Lawson was "the perpetrator of what he should have known was a violation of the Act," as well as the president and agent of both Sugartree and petitioner, petitioner had notice of the discrimination charges (*id.* at 15-16). The ALJ also found that there was "a substantial continuity of business operations" insofar as petitioner "continued to mine coal from essentially the same mine as Sugartree using substantially the same workforce and supervisory personnel" (*id.* at 16-18). The ALJ therefore ordered petitioner to reinstate the miners and held petitioner jointly and severally liable with Sugartree for back pay and civil penalties arising out of the unlawful discharges (*id.* at 19-21).

Petitioner sought review by the Commission of the ALJ's successorship determination. Applying the test enunciated in *Munsey* v. *MacMillan Bloedel, supra,* the Commission affirmed the ALJ's ruling that petitioner "is a successor business entity to Sugartree jointly and severally liable for remedying the illegal acts of discrimination committed by Sugartree and Lawson" (Pet. App. 48). The Commission expressly rejected petitioner's argument that only a successor who purchases the assets and stock of its

predecessor can be held liable (*id.* at 47-48). Because two of the complainants had settled their cases (see *id.* at 39 n.3), the Commission directed petitioner to comply with the ALJ's order awarding damages to the remaining complainant (*id.* at 48-49).

3. The court of appeals affirmed (Pet. App. 50-57). It agreed with the Commission that the evidence presented satisfied each of the nine factors identified in *MacMillan Bloedel* as relevant to consideration of successorship status (*id.* at 56). With respect to what it called the "most important" factor, the court noted that "there was a substantial and obvious continuity of business operations between [petitioner] and Sugartree," inasmuch as (i) a large portion of petitioner's work force was composed of former Sugartree employees; (ii) petitioner began operating the mine only one week after Sugartree ceased operations; and (iii) the change in mining procedures undertaken by petitioner "would have taken place even if Sugartree had continued to operate the mine" (*id.* at 56-57). Regarding the remaining factors, the court indicated that petitioner "clearly had notice" of the charges since "there was a complete identity of corporate officers and Lawson, as president, was the one responsible for the discharges;" that Sugartree "was left as a hollow shell and had no capacity to provide the relief ordered by the Commission;" that "the mining jobs under [petitioner] existed under substantially the same conditions as they did at Sugartree;" that despite a change in mining methods, "the same personnel could be employed," and petitioner "continued to use the same equipment and machinery used by Sugartree to the extent possible;" and that "[c]oal production was the business of both companies" (*ibid.*).

The court rejected petitioner's argument that because it did not actually purchase Sugartree's business, it should not be considered a successor. The court explained that "[a]lthough a sale or lack thereof is certainly one of the

factors to which a court can look, it is not in and of itself determinative" (Pet. App. 57). Indeed, the court concluded that "here, the lack of a sale may actually indicate that the predecessor and successor corporations are so closely linked that arms length dealings as usually occur during a sale never occur nor are they necessary" (*ibid.*).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioner's argument that it is not a successor is based largely on its disagreement with the ALJ's factual findings, which were affirmed by both the Commission and the court of appeals. Review by this Court is therefore not warranted.

1. The determination whether a new employer is a successor to the former employer "is primarily factual in nature and is based upon the totality of the circumstances of a given situation." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 15. "[T]he real question * * * is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative?" *Howard Johnson Co.* v. *Detroit Local Joint Executive Bd., Hotel & Restaurant Employees Int'l Union*, 417 U.S. 249, 262 n.9 (1974). And "[t]he answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue" (*id.* at 263 n.9).

As petitioner acknowledges (Pet. 17), the courts consider a number of factors in determining successorship. These include:

> 1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide

> relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

EEOC v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974).

In the present case, the ALJ, after applying the nine-factor analysis, found that each of these elements had been met (Pet. App. 14-18). That finding was sustained by both the Commission (*id.* at 43-47) and the court of appeals (*id.* at 56-57).

Petitioner disputes the findings of the ALJ with respect to several of these factors. However, because the ALJ's findings against petitioner were upheld by the Commission and the court of appeals, there is plainly no justification for review by this Court. Cf. *Berenyi* v. *District Director*, 385 U.S. 630, 635 (1967) (citation omitted) (noting that the Court will not " 'review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error' "). In any event, the ALJ's findings were correct. For example, the conclusion that petitioner had notice of the charge against its predecessor followed from the undisputed evidence that Lawson, the Sugartree officer responsible for the discharges, was also president of petitioner (Pet. App. 56). Moreover, as to the continuity of business operations, the Commission and the court below specifically noted that 13 of 15 employees hired by petitioner in July 1984 for the mine previously

operated by Sugartree were formerly employed by Sugartree; that approximately 50% of petitioner's total work force had worked for Sugartree; that petitioner resumed operations at the same mine only one week after Sugartee ceased operations; and that the changes in mining procedures instituted by petitioner had been contemplated and would have been undertaken by Sugartree, had it continued operating the mine (*id.* at 44-47, 56-57).

2. Petitioner further maintains (Pet. 12-16) that because there was no finding that it had purchased or leased assets from Sugartree, the finding of successorship here is contrary to this Court's decision in *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973). According to petitioner (Pet. 16), "a court cannot even reach the nine step analysis * * * to determine successorship unless a purchase or at least a lease of assets has occurred." Petitioner also asserts (*id.* at 15) that the circuit court decisions upholding findings of successorship "invariably deal with situations in which the 'successor' had leased or purchased the assets of its predecessor * * *." These assertions are simply incorrect.

In *Golden State Bottling Co.*, this Court declined to adopt a hard-and-fast rule concerning the nature of the transaction that may lead to successorship liability in the labor law context. As the Court explained, "[t]he refusal to adopt a mode of analysis requiring the [NLRB] to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served by its broad application" (414 U.S. at 183 n.5 (citation omitted)). To be sure, there was a transfer of assets in *Golden State Bottling Co.* But this Court has also sustained findings of successorship in circumstances that did not involve asset transfers. See *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272,

280-281 & n.4 (1972). Moreover, contrary to petitioner's assertion (Pet. 15), other courts of appeals that have considered the question have agreed with the court below that a transfer of assets is not an essential prerequisite to a finding of successorship. See, *e.g.*, *Saks & Co.* v. *NLRB*, 634 F.2d 681, 687 (2d Cir. 1980) ("[W]hile a transfer of assets may be evidence of the requisite continuity of business operations, it has not been thought to be a necessary condition * * *."); *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1027-1028 (7th Cir. 1969).

Petitioner maintains (Pet. 13-14) that because it did not purchase any assets from Sugartree, it did not benefit from Sugartree's discriminatory practices. However, where, as here, there is a continuity in the work force, failure to remedy unfair practices has a chilling effect on the exercise of the employees' guaranteed rights which inures to the benefit of the successor employer. Cf. *Golden State Bottling Co.*, 414 U.S. at 184.

Nor is there any merit to the suggestion (Pet. 13-14) that because there was no formal purchase of assets, petitioner could not protect itself against potential liability for Sugartree's discriminatory practices by means of an indemnity clause or a price adjustment for the assets purchased. As the court below recognized (Pet. App. 57), the facts of this case reflect that "the predecessor and successor corporations are so closely linked that arms length dealings as usually occur during a sale never occur nor are they necessary."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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